

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Alison Moffat,

Complainant,

vs.

Hennepin County,

Respondent.

-
ORDER REGARDING
SEQUESTRATION, WITNESS
DISCLOSURE, SUBPOENA
REQUESTS, AND OTHER
PREHEARING MATTERS

The above-entitled matter is pending before the undersigned Administrative Law Judge. After issues were raised orally and in letters by the parties regarding sequestration of witnesses, the Administrative Law Judge requested that the parties file written briefs regarding the issue. Hennepin County filed a letter brief on May 7, 1996, and the Complainant filed a letter brief on May 13, 1996. An oral ruling was issued in a telephone conference call regarding the issue on May 22, 1996. Hennepin County requested clarification of the oral ruling by letter dated June 7, 1996.

On June 4, 1996, Hennepin County requested the issuance of a subpoena duces tecum requiring the Complainant and three of her other witnesses to bring various documents with them to the hearing for inspection by the County. A conference call was held with the parties on June 7, 1996, to discuss these subpoena requests. The County's objection to the Complainant's designation of certain witnesses as "adverse" was also considered at that time. The Administrative Law Judge issued an oral ruling regarding these issues during the June 7, 1996, conference call.

Finally, on June 11, 1996, an additional conference call was held with counsel at the request of the County. During that conference call, the County requested that the Complainant's expert witness, Nira Scherz-Busch, bring to the hearing legible copies of certain materials requested during discovery. An oral ruling was issued during the June 11 conference call regarding this matter.

This written Prehearing Order will confirm and clarify the terms of the oral rulings described above.

Based upon all of the files, proceedings, and arguments herein, and as discussed in the Memorandum below, IT IS HEREBY ORDERED as follows:

1. Hennepin County shall be permitted to designate Nancy Skilling as its designated representative during the hearing. As such, Ms. Skilling will be allowed to be present during all witness testimony.

2. Hennepin County shall be permitted to have no more than one expert witness present during the Complainant's testimony and during the testimony of Ms. Skilling and the Complainant's expert witnesses.

3. The Complainant will be permitted to have no more than one expert witness present during the testimony of Hennepin County's expert witnesses and, if she chooses, during the testimony of the Complainant and Ms. Skilling.

4. All other witnesses will be sequestered during the hearing. Such witnesses will be directed not to talk to each other during the course of the trial.

5. Counsel for the parties shall not relate a detailed description of the testimony given by a prior witness when preparing upcoming witnesses. However, when preparing another witness for testimony, counsel shall be permitted to inquire of that witness whether a particular fact is true or whether a particular incident occurred, without revealing that an earlier witness testified to that fact or incident or telling the witness precisely what the earlier witness said.

6. Counsel for the parties shall be permitted to discuss with their expert witnesses the testimony of the Complainant, Ms. Skilling, and each other's expert witnesses even if such expert witnesses were not present in the courtroom during that testimony.

7. By May 23, 1996, at 4:30 p.m., counsel shall disclose to each other the dates on which their experts are expected to appear and testify (specifying morning or afternoon) and an approximation of the length of time that each such expert will undergo direct questioning.

8. The Complainant shall discuss the issue of payment for the deposition testimony of her expert witness informally with counsel for the County prior to filing a formal motion.

9. The parties shall submit post-hearing briefs in accordance with a schedule to be established at the conclusion of the hearing, and shall submit proposed Findings of Fact and Conclusions of Law with their post-hearing briefs.

10. The parties shall deliver or fax to each other as soon as possible any documents that appear on the party's exhibit list that the opposing party indicates are lacking.

11. The Complainant shall produce to the County as quickly as possible all documents which were the basis for the trial exhibits created by the Complainant entitled "Alison Moffat's Wage Loss" and "Alison's Weekly Gross Income," the Complainant's federal and state income tax returns for 1995, and documents relating to the Complainant's employment during 1996. If, upon inspection, Hennepin County determines that the exhibit entitled "Summary of Job Action" is not derived solely from exhibits received by the Complainant from the County, the County shall bring the matter to the attention of the Complainant and the Administrative Law Judge and the Complainant shall provide any additional supporting documents.

12. Both parties shall confirm in writing that all expert reports, non-privileged notes taken by any of their experts, and other documents generated by their experts during the testing of the Complainant have been provided to the opposing party.

13. Ms. Carpenter shall bring with her to the hearing all documents received from any source and reviewed in preparation for her testimony at the deposition and hearing, including the three-ring binder that she apparently reviewed in preparation for her deposition, provided that counsel for the Complainant may review the documents and remove any privileged material prior to production to the County's attorneys.

14. Hennepin County's expert witnesses shall bring to the hearing all documents received from any source and reviewed in preparation for their testimony at their depositions and the hearing, provided that counsel for Hennepin County may review the documents and remove any privileged material prior to production to the Complainant's attorney.

15. The Complainant has not made an adequate showing at this time that Penny Schmal, Wayne Ganzhorn, and Yvonne Hrcir are "adverse" witnesses who may be examined by leading questions. The Complainant will be permitted to provide additional information at the time of hearing to show that these witnesses in fact have an adverse relationship with the Complainant.

16. Hennepin County shall instruct Penny Schmal, Wayne Ganzhorn, and Yvonne Hrcir by the end of the day on June 7, 1996, that they are permitted to speak to counsel for the Complainant outside the presence of counsel for the County.

17. Nira Scherz-Busch shall bring to the hearing legible copies of the subject response booklet for the Woodcock Johnson Revised Test of Achievement and the protocols from the Woodcock Johnson Revised Test of Cognitive Ability.

Dated this _____ day of June, 1996.

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Sequestration Issues

The rules of the Office of Administrative Hearings governing contested case proceedings provide that, “[a]t the request of a party or upon the judge’s own motion, the judge shall exclude witnesses from the hearing room so that they cannot hear the testimony of other witnesses.” Minn. R. 1400.7200 (1995). Administrative Law Judges generally “should sequester witnesses when requested unless a party can put forth ample justification for the witness to hear other testimony.” G. Beck, L. Bakken, & T. Muck, Minnesota Administrative Procedure at 225 (1987). In addition, Administrative Law Judges have looked to Rule 615 of the state and federal Rules of Evidence for guidance in construing sequestration requirements.

The Complainant’s general request that witnesses be sequestered will be granted. The County has not made any showing of good cause why such witnesses should be allowed to hear each other’s testimony. The question then becomes what, if any, exceptions to the sequestration order will be allowed.

Pursuant to Rule 615 of the federal Rules of Evidence, exceptions to the sequestration requirements are recognized for (1) a party who is a natural person, (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party’s cause. Under the second exception, Hennepin County is entitled to designate a representative who will be allowed to remain in the courtroom during the hearing. The County wishes to designate Ms. Skilling as its representative. The Complainant has objected to the designation of Ms. Skilling due to her involvement in the case and concern that her testimony will be “tailored” if she remains in the courtroom throughout the trial. The Complainant has not cited any authority for the proposition that it can require the County to designate a different representative, and the Judge is not aware of any. In the Judge’s experience, and as reflected in applicable case law, it is frequently the case that persons designated as party representatives have significant involvement in the case and are nevertheless permitted to remain in the courtroom throughout the trial and provide their own testimony in the case. See, e.g., U.S. v. Crabtree, 979 F.2d 1261, 1270 (7th Cir. 1992); United States v. Sykes, 977 F.2d 1242, 1244-45 (8th Cir. 1992); U.S. v. Gonzalez, 918 F.2d 1139 (3d Cir. 1990); U.S. v. Nelson, 603 F.2d 42 (8th Cir. 1979). Moreover, if the Complainant wishes, she may call Ms. Skilling as an adverse witness and thereby ensure that her testimony is taken at a fairly early point in the proceedings. See In re United States, 584 F.2d 666 (5th Cir. 1978). Accordingly, Ms. Skilling will be permitted to be the County’s representative in this case.

Turning to the question of whether experts will be excepted from the sequestration order, it is evident that the third exception under Fed. R. Ev. 615 for a person whose presence is essential to the presentation of the party’s cause “contemplates . . . an expert needed to advise counsel in the management of the litigation.” See Advisory Committee’s Note to Federal Rule of Evidence 615. The general purpose of sequestration is to remove any possibility that the witness waiting to testify may be influenced consciously or subconsciously by the testimony of other witnesses and to afford opposing counsel the opportunity of bring out discrepancies in the testimony of witnesses during cross-

examination. See State v. Miller, 396 N.W.2d 903, 906 (Minn. App. 1986). Several cases have held that expert testimony by its nature is not susceptible to being tempered or shaped by what the experts sees or hears in the courtroom. United States v. Conners, 894 F.2d 987, 991 (8th Cir. 1996). The presence of an expert during the trial is frequently found to be essential to the expert's ability to effectively testify regarding the exhibits and to assist counsel in managing the case. See Morvant v. Construction Aggregates Corp., 570 F.2d 626 (6th Cir. 1978).

The County has indicated that it will not have more than one expert present at any one time during the hearing. It merely seeks to have its experts present during the testimony of the experts called by the Complainant and perhaps during the testimony of the Complainant and Ms. Skilling. It is appropriate to permit the County to have its expert witnesses present, no more than one at a time, during this testimony, and to afford the same opportunity to the Complainant's expert witnesses.

Witnesses that are sequestered shall be directed not to talk to each other during the course of a trial. Regarding the issue of whether attorneys should also be directed not to discuss witness testimony with upcoming witnesses, it appears logical that a detailed discussion by the attorney of the testimony given by the prior witness would violate the purposes of the sequestration order by revealing witness testimony. See United States v. Whiteside, 404 F. Supp. 261 (D. Del. 1975). Nothing in the cases relied upon by the County supports a contrary proposition. See United States v. Kindle, 925 F.2d 272, 276 (8th Cir. 1991) (there was no evidence that the sequestration order prohibited contact between government agents and witnesses in a criminal case, and the contact ceased once the contact was brought to the attention of the court; no showing that contact resulted in tailoring of witness testimony or otherwise resulted in prejudice to the appellant); United States v. Stewart, 878 F.2d 256, 259 (8th Cir. 1989) (sequestration order specifically stated that it did not apply to government agents in a criminal case; Rule 615 does not authorize trial courts to prevent executive branch officials from conferring with their witnesses by barring them from communicating with those witnesses during the trial). In preparing upcoming witnesses for testifying, however, it is appropriate to permit attorneys who are preparing another witness to inquire of that witness whether a particular fact is true or whether a particular incident occurred, without revealing that an earlier witness testified to that fact or incident or telling the witness precisely what the earlier witness said.

Anticipated Date that Experts will be Called

During the May 22, 1996, conference call, the parties were also ordered to disclose to each other by 4:30 p.m. on May 23, 1996, the dates on which they anticipate calling their experts to testify (specifying morning or afternoon) and an estimate of the length of time that the direct testimony of each such expert will take.

Complainant's Request for Payment of Expert Fees

Prior to filing a formal motion, the Complainant shall discuss this issue informally with counsel for Hennepin County.

Post-Hearing Briefs and Proposed Findings of Fact

Due to the anticipated length of this hearing, the parties will be asked to submit post-hearing briefs in lieu of providing oral closing argument. The briefing schedule will be established at the conclusion of the trial. The parties will be expected to prepare proposed Findings of Fact and Conclusions of Law and submit them with their post-hearing briefs following the hearing.

Missing Exhibits

Counsel shall identify to opposing counsel any exhibits they lack that appear on the opposing party's exhibit list. Such exhibits shall be delivered or faxed to the requesting party as soon as possible after the request is received.

County's Subpoena Request

A lengthy discussion was held during the June 7, 1996, conference call concerning the County's June 4, 1996, request for the issuance of subpoenas duces tecum directed to Ms. Moffat, Winnelle Carpenter, Nira Scherz-Busch, and Ricki Roberts. The Administrative Law Judge expressed reluctance to issue subpoenas for information that was obtainable in discovery. After discussion and argument, the Complainant was ordered to produce to the County as quickly as possible all documents which were the basis for the trial exhibits created by the Complainant entitled "Alison Moffat's Wage Loss" and "Alison's Weekly Gross Income," the Complainant's federal and state income tax returns for 1995, and documents relating to the Complainant's employment during 1996. If, upon inspection, Hennepin County determines that the exhibit entitled "Summary of Job Action" is not derived solely from exhibits received by the Complainant from the County, the County shall bring the matter to the attention of the Complainant and the Administrative Law Judge and the Complainant shall provide any additional supporting documents.

Both parties shall confirm in writing that all expert reports, non-privileged notes taken by any of the experts, and other documents generated by the expert during the testing of the Complainant have been provided to the opposing party. Based upon the representations of counsel for Ms. Moffat that this assurance will be forthcoming, the County withdrew its request for a subpoena directed to Ricki Roberts and Nira Scherz-Busch.

At the time of her deposition, Winelle Carpenter apparently was unable to point in detail to particular documents she had reviewed or upon which she had relied in reaching her opinion concerning the extent of the Complainant's disability or the reasonable accommodation that was appropriate. Under these circumstances, it is appropriate to require Ms. Carpenter to bring to the hearing all documents received from any source and reviewed in preparation for her testimony at the deposition and hearing, including the three-ring binder that she apparently reviewed in preparation for her deposition; provided that counsel for the Complainant may review the documents provided by Ms. Carpenter and remove any privileged material from these documents prior to production to the

County's attorneys. In addition, Hennepin County's experts shall bring to the hearing all documents received from any source and reviewed in preparation for their testimony at their depositions and the hearing, with the exception of any privileged material.

"Adverse" Witnesses

By letter dated June 7, 1996, the County objected to the Complainant's designation of Penny Schmal, Wayne Ganzhorn, and Yvonne Hrcir as "adverse" witnesses in her April 24, 1996, Prehearing Statement. Based upon discussions with counsel, the Judge is not persuaded that the Complainant has made an adequate showing at this time that these witnesses are adverse to the Complainant. Their sympathies would instead seem to lie more with the Complainant than with higher level County management. The Complainant will be permitted to provide additional information at the time of hearing to show that these witnesses in fact have an adverse relationship with the Complainant.

Counsel for Hennepin County previously complained when counsel for the Complainant and/or the Complainant herself contacted these witnesses. As a result, the Complainant does not have any definite information about the nature of the testimony of these witnesses. The County will instruct these witnesses by the end of the day on June 7, 1996, that they are permitted to speak to counsel for the Complainant outside the presence of counsel for the County.

Legible Copies of Testing Information

During the parties' conference call on June 11, 1996, the County indicated that it was unable to read certain documents it had received during discovery. Accordingly, the Judge ordered the Complainant to ensure that Nira Scherz-Busch brings to the hearing legible copies of the subject response booklet for the Woodcock Johnson Revised Test of Achievement and the protocols from the Woodcock Johnson Revised Test of Cognitive Ability.

B.L.N.